



1 disorder versus post-traumatic stress disorder (PTSD). (Tr 303-04.)  
2 Her claim was denied initially and on reconsideration. Plaintiff  
3 requested a hearing before an administrative law judge (ALJ), which  
4 was held on February 21, 2008, before ALJ Dan R. Hyatt. (Tr. 299-  
5 322.) Plaintiff, who was represented by counsel, and vocational  
6 expert Jenipher Gaffney (VE) testified. The ALJ denied benefits on  
7 March 17, 2008, and the Appeals Council denied review. (Tr. 13-21,  
8 4-6.) The instant matter is before this court pursuant to 42 U.S.C.  
9 § 405(g).

#### 10 **STATEMENT OF THE CASE**

11 The facts of the case are set forth in detail in the transcript  
12 of proceedings, and are briefly summarized here. At the time of the  
13 hearing, Plaintiff was 39 years old. She had a ninth grade  
14 education in special education, but did not finish high school or  
15 complete her high school equivalency tests. (Tr. 304.) Plaintiff  
16 was married and had no children. (Tr. 305.) Plaintiff reported she  
17 tested herself twice daily for diabetes for which she takes  
18 medication. (Tr. 305-06.) She had past work experience as a child  
19 care attendant, a machine packager, nurse's aide, sandwich  
20 maker/fast food worker, and furniture assembler. (Tr. 308-12, 316-  
21 17.) She stated she was let go from most of her jobs for lack of  
22 attendance or performance issues. (Tr. 311-312.) She testified she  
23 could no longer work due to pain in her back and legs. (Tr. 313.)

#### 24 **ADMINISTRATIVE DECISION**

25 At step one, ALJ Hyatt found Plaintiff had not engaged in  
26 substantial gainful activity since the alleged onset date. (Tr.  
27 15.) At step two, he found Plaintiff had severe impairments of  
28

1 "borderline intellectual functioning, obesity, [and] degenerative  
2 disc disease of the lumbar spine." (*Id.*) He found non-severe  
3 impairments of diabetes, degenerative disc disease of the cervical  
4 spine, and "anxiety disorder versus posttraumatic stress disorder."  
5 (*Id.*) The ALJ determined at step three the impairments, alone and  
6 in combination, did not meet or medically equal one of the listed  
7 impairments in 20 C.F.R., Appendix 1, Subpart P, Regulations No. 4  
8 (Listings). (*Id.*) He found Plaintiff's statements regarding her  
9 symptoms and limitations were "not credible to the extent they are  
10 inconsistent with the residual functional capacity assessment."  
11 (Tr. 17.) At step four, he determined Plaintiff had the residual  
12 functional capacity (RFC) to lift 10 pounds frequently and 25 pounds  
13 occasionally; stand and walk four hours in an eight-hour day; and  
14 sit for six hours in an eight-hour day, requiring an option to sit  
15 or stand at will. She was also "limited to simple, repetitive tasks  
16 with no contact with the public." (Tr. 16.) Based on this RFC and  
17 VE testimony, the ALJ found Plaintiff was unable to perform her past  
18 relevant work. (Tr. 19.) Proceeding to step five, ALJ Hyatt  
19 determined Plaintiff was able to perform other jobs that existed in  
20 significant numbers in the national economy, such as office helper,  
21 small products assembler and marker/pricer. (Tr. 20.) He concluded  
22 Plaintiff was not under a "disability" as defined by the Social  
23 Security Act at any time through the date of his decision. (Tr.  
24 21.)

#### 25 STANDARD OF REVIEW

26 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
27 court set out the standard of review:

1 A district court's order upholding the Commissioner's  
 2 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,  
 3 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the  
 4 Commissioner may be reversed only if it is not supported  
 5 by substantial evidence or if it is based on legal error.  
 6 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).  
 7 Substantial evidence is defined as being more than a mere  
 8 scintilla, but less than a preponderance. *Id.* at 1098.  
 9 Put another way, substantial evidence is such relevant  
 10 evidence as a reasonable mind might accept as adequate to  
 11 support a conclusion. *Richardson v. Perales*, 402 U.S.  
 12 389, 401 (1971). If the evidence is susceptible to more  
 13 than one rational interpretation, the court may not  
 14 substitute its judgment for that of the Commissioner.  
 15 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*  
 16 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

17 The ALJ is responsible for determining credibility,  
 18 resolving conflicts in medical testimony, and resolving  
 19 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
 20 Cir. 1995). The ALJ's determinations of law are reviewed  
 21 *de novo*, although deference is owed to a reasonable  
 22 construction of the applicable statutes. *McNatt v. Apfel*,  
 23 201 F.3d 1084, 1087 (9th Cir. 2000).

#### 14 SEQUENTIAL PROCESS

15 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the  
 16 requirements necessary to establish disability:

17 Under the Social Security Act, individuals who are  
 18 "under a disability" are eligible to receive benefits. 42  
 19 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any  
 20 medically determinable physical or mental impairment"  
 21 which prevents one from engaging "in any substantial  
 22 gainful activity" and is expected to result in death or  
 23 last "for a continuous period of not less than 12 months."  
 24 42 U.S.C. § 423(d)(1)(A). Such an impairment must result  
 25 from "anatomical, physiological, or psychological  
 26 abnormalities which are demonstrable by medically  
 27 acceptable clinical and laboratory diagnostic techniques."  
 28 42 U.S.C. § 423(d)(3). The Act also provides that a  
 claimant will be eligible for benefits only if his  
 impairments "are of such severity that he is not only  
 unable to do his previous work but cannot, considering his  
 age, education and work experience, engage in any other  
 kind of substantial gainful work which exists in the  
 national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,  
 the definition of disability consists of both medical and  
 vocational components.

In evaluating whether a claimant suffers from a

1 disability, an ALJ must apply a five-step sequential  
2 inquiry addressing both components of the definition,  
3 until a question is answered affirmatively or negatively  
4 in such a way that an ultimate determination can be made.  
5 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The  
6 claimant bears the burden of proving that [s]he is  
7 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
8 1999). This requires the presentation of "complete and  
9 detailed objective medical reports of h[is] condition from  
10 licensed medical professionals." *Id.* (citing 20 C.F.R. §§  
11 404.1512(a)-(b), 404.1513(d)).

12 It is the role of the trier of fact, not this court, to resolve  
13 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
14 supports more than one rational interpretation, the court may not  
15 substitute its judgment for that of the Commissioner. *Tackett*, 180  
16 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
17 Nevertheless, a decision supported by substantial evidence will  
18 still be set aside if the proper legal standards were not applied in  
19 weighing the evidence and making the decision. *Browner v. Secretary*  
20 *of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If  
21 there is substantial evidence to support the administrative  
22 findings, or if there is conflicting evidence that will support a  
23 finding of either disability or non-disability, the finding of the  
24 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
25 1230 (9<sup>th</sup> Cir. 1987).

#### 26 ISSUES

27 The question is whether the ALJ's decision is supported by  
28 substantial evidence and free of legal error. Plaintiff argues the  
ALJ erred when he: (1) rejected her cervical spine DDD and mental  
impairments as "frivolous" at step two; (2) improperly rejected the  
opinions of medical sources; (3) improperly rejected her testimony;  
and (4) failed to meet the Commissioner's burden at step five. (Ct.

1 Rec. 24 at 10-11.)

2 **DISCUSSION**

3 **A. Credibility**

4 Plaintiff argues the ALJ did not provide the requisite "clear  
5 and convincing" reasons for rejecting her subjective complaints.  
6 (Ct. Rec. 24 at 19; Ct. Rec. 30 at 7.) When the ALJ finds a  
7 claimant's statements as to the severity of impairments, pain and  
8 limitations are not credible, the ALJ must make a credibility  
9 determination with findings sufficiently specific to permit the  
10 court to conclude the ALJ did not arbitrarily discredit claimant's  
11 allegations. *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9<sup>th</sup> Cir.  
12 2002); *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9<sup>th</sup> Cir. 1991) (en  
13 banc). It is well-settled, however, that an ALJ cannot be required  
14 to believe every allegation of disabling pain, even when medical  
15 evidence exists that a claimant's condition may produce pain. "Many  
16 medical conditions produce pain not severe enough to preclude  
17 gainful employment." *Fair v. Bowen*, 885 F.2d 597, 603 (9<sup>th</sup> Cir.  
18 1989). Although an adjudicator may not reject a claimant's extreme  
19 symptom complaints solely on a lack of objective medical evidence,  
20 medical evidence is a relevant factor to consider. *Social Security*  
21 *Ruling* (SSR) 96-7p.

22 If there is no affirmative evidence that the claimant is  
23 malingering, the ALJ must provide "clear and convincing" reasons for  
24 rejecting the claimant's allegations regarding the severity of  
25 symptoms. *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir. 1998). The  
26 ALJ engages in a two-step analysis in deciding whether to admit a  
27 claimant's subjective symptom testimony. *Lingenfelter v. Astrue*,  
28

1 504 F.3d 1028, 1035-36 (9<sup>th</sup> Cir. 2007); *Smolen v. Chater*, 80 F.3d  
2 1273, 1281 (9<sup>th</sup> Cir. 1996). Under the first step, the ALJ must find  
3 the claimant has produced objective medical evidence of an  
4 underlying "impairment," and that the impairment, or combination of  
5 impairments, could reasonably be expected to cause "some degree of  
6 the symptom." *Lingenfelter*, 504 F.3d at 1036. Once the first test  
7 is met, the ALJ must evaluate the credibility of the claimant and  
8 make specific findings supported by "clear and convincing" reasons.  
9 *Id.* In addition to ordinary techniques of credibility evaluation,  
10 the ALJ may consider the following factors when weighing the  
11 claimant's credibility: the claimant's reputation for truthfulness;  
12 inconsistencies either in her allegations of limitations or between  
13 her statements and conduct; daily activities and work record; and  
14 testimony from physicians and third parties concerning the nature,  
15 severity, and effect of the alleged symptoms. *Light v. Social Sec.*  
16 *Admin.*, 119 F.3d 789, 792 (9<sup>th</sup> Cir. 1997); *Fair*, 885 F.2d at 597  
17 n.5.

18 The ALJ may also consider an unexplained failure to follow  
19 treatment recommendations and testimony by the claimant "that  
20 appears less than candid." *Tommasetti v. Astrue*, 533 F.3d 1035,  
21 1039 (9<sup>th</sup> Cir. 2008). As explained by the Commissioner in his policy  
22 ruling, the ALJ need not totally reject a claimant's statements; he  
23 may find the claimant's statements about pain to be credible to a  
24 certain degree, but discount statements based on his interpretation  
25 of evidence in the record as a whole. SSR 96-7p. "For example, an  
26 adjudicator may find credible an individual's statement as to the  
27 extent of the functional limitations or restrictions due to  
28

1 symptoms; *i.e.*, that the individual's abilities to lift and carry  
2 are compromised, but not to the degree alleged." *Id.* If the ALJ's  
3 credibility finding is supported by substantial evidence in the  
4 record, "the court may not engage in second-guessing." *Thomas*, 278  
5 F.3d at 959; *Fair*, 885 F.2d at 604 ("credibility determinations are  
6 the province of the ALJ").

7 Here, there is no evidence of malingering. In explaining his  
8 basis for the RFC determination, the ALJ summarized Plaintiff's  
9 testimony, specifically noting her testimony that she took  
10 medication for her diabetes only, took care of the household chores,  
11 had trouble bending, and weighed 269 pounds. He also referenced  
12 her testimony that fatigue and back and leg pain prevented her from  
13 sitting or standing for a long time or lifting heavy things, and  
14 that pain and fatigue affected her energy level and her ability to  
15 sleep at night and concentrate. (Tr. 17, 313.) The ALJ then found  
16 that Plaintiff's medically determinable impairments could reasonably  
17 be expected to cause these symptoms and gave specific reasons for  
18 discounting the severity alleged. (Tr. 17.)

19 First, he found Plaintiff's statements were not consistent with  
20 the daily activities she described in her testimony and in the  
21 records, *i.e.*, taking care of household chores, doing laundry with  
22 her spouse's help when bending is necessary, being a primary care-  
23 giver for her father until his death in December 2004, cooking,  
24 exercising and swimming. *Id.* Inconsistency with activities of  
25 daily living is a "clear and convincing" reason to discount  
26 Plaintiff's testimony, and the ALJ properly gave specific examples  
27 to support his findings. Next, the ALJ found that Plaintiff's  
28 allegations of debilitating symptoms were not consistent with her



1 treatment record. Plaintiff appears to argue her treatment history  
2 is not a legitimate reason to reject her testimony. (Ct. Rec. 30 at  
3 9-10.) This argument is not persuasive because the Ninth Circuit  
4 Court of Appeals has held that minimal or conservative treatment for  
5 allegedly disabling symptoms is a "clear and convincing" reason to  
6 support an adverse credibility finding. *Tommasetti*, 533 F.3d at  
7 1039; *Parra v. Astrue*, 481 F.3d 742, 750-51 (9<sup>th</sup> Cir. 2007); *Light*,  
8 119 F.3d at 792. The ALJ accurately noted that Plaintiff was not  
9 prescribed pain medication for her allegedly disabling neck and back  
10 pain, and that she reported to her examining physician that she had  
11 not seen an orthopedic specialist for her complaints since 1999.  
12 (Tr. 17.) The record amply supports this basis for the ALJ's  
13 credibility determination. For example, as noted by the ALJ,  
14 Plaintiff was receiving medical care from Deana Dahl, ARNP, from May  
15 2004 until August 2007. (Tr. 18-19.) Beginning in May 2004,  
16 Plaintiff was treated with medication for diabetes (which was noted  
17 as "stable") and elevated lipids. (Tr. 193.) Plaintiff complained  
18 of low back pain in October 2004, at which time Nurse Dahl  
19 recommended "increased activity." (Tr. 248, 251.) In March 2006,  
20 Nurse Dahl noted Plaintiff's back and leg pain "with walking." (Tr.  
21 254.) In May 2007, Plaintiff's neck and back pain were noted as  
22 mild to moderate in clinic notes, and there is no record of  
23 prescribed pain medication. (Tr. 260.) At that time, Nurse Dahl  
24 specifically recommended stretching and regular exercise to relieve  
25 neck and back pain, and ordered x-rays. (Tr. 261.) The ALJ's  
26 rationally interpreted the evidence and articulated "clear and  
27 convincing" reasons for discounting the severity of Plaintiff's  
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1 assertions of disabling pain and fatigue. It is also noted that  
2 the ALJ's credibility findings did not totally reject Plaintiff's  
3 subjective symptoms. As discussed below, the final RFC incorporates  
4 walking and standing limitations with an option to stand and sit at  
5 will to relieve discomfort, as well as limitations caused by her  
6 borderline intellectual functioning. The RFC is consistent with  
7 Plaintiff's medically determinable impairments and credited medical  
8 evidence, as well Plaintiff's own credible testimony.

9 **B. Step Two: Non-Severe Impairments**

10 Plaintiff argues the ALJ erred when he rejected her diagnosed  
11 cervical spine disorder and mental impairments as "frivolous."  
12 (Ct. Rec. 24 at 13.) She argues the ALJ erroneously rejected the  
13 opinions of Nurse Dahl that these impairments caused significant  
14 limitations. She also claims the ALJ improperly rejected the  
15 opinions of agency and examining physicians whose opinions, if  
16 credited, would require a finding of disability. (*Id.* at 14-15.)

17 At step two of the sequential evaluation, the ALJ determines  
18 whether a claimant suffers from a "severe" impairment, *i.e.*, one  
19 that significantly limits her physical or mental ability to do basic  
20 work activities. 20 C.F.R. § 416.920(c). To satisfy step two's  
21 requirement of a severe impairment, the claimant must prove the  
22 existence of a physical or mental impairment by providing medical  
23 evidence consisting of signs, symptoms, and laboratory findings; the  
24 claimant's own statement of symptoms alone will not suffice. 20  
25 C.F.R. § 416.908. The fact that a medically determinable condition  
26 exists does not automatically mean the symptoms are "severe," or  
27 "disabling" as defined by the Social Security regulations. See,

1 *e.g., Edlund*, 253 F.3d at 1159-60; *Fair*, 885 F.2d at 603; *Key v.*  
2 *Heckler*, 754 F.2d 1545, 1549-50 (9<sup>th</sup> Cir. 1985).

3       The Commissioner has passed regulations which guide dismissal  
4 of claims at step two. Those regulations state an impairment may be  
5 found to be not severe when "medical evidence establishes only a  
6 slight abnormality or a combination of slight abnormalities which  
7 would have no more than a minimal effect on an individual's ability  
8 to work." SSR 85-28 at 3.<sup>1</sup> "The severity requirement cannot be  
9 satisfied when medical evidence shows that the person has the  
10 ability to perform basic work activities, as required in most jobs."  
11 Basic work activities include: "walking, standing, sitting, lifting,  
12 pushing, pulling, reaching, carrying, or handling; seeing, hearing,  
13 speaking; understanding, carrying out and remembering simple  
14 instructions; responding appropriately to supervision, coworkers,  
15 and usual work situation." *Id.*

16       Further, even where non-severe impairments exist, these  
17 impairments must be considered in combination at step two to  
18 determine if, together, they have more than a minimal effect on a  
19 claimant's ability to perform work activities. 20 C.F.R. § 416.929.  
20 If impairments in combination have a significant effect on a  
21 claimant's ability to do basic work activities, they must be  
22 considered throughout the sequential evaluation process. *Id.*

23       As explained in the Commissioner's policy ruling, "medical  
24 evidence alone is evaluated in order to assess the effects of the

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25  
26       <sup>1</sup> The Supreme Court upheld the validity of the Commissioner's  
27 severity regulation, as clarified in SSR 85-28, in *Bowen v. Yuckert*,  
28 482 U.S. 137, 153-154 (1987).

1 impairments on ability to do basic work activities." *Id.* Thus, in  
2 determining whether a claimant has a severe impairment, the ALJ  
3 evaluates the medical evidence submitted and must explain the weight  
4 given to the opinions of accepted medical sources in the record.  
5 The agency regulations distinguish among the opinions of three types  
6 of accepted medical sources: (1) sources who have treated the  
7 claimant; (2) sources who have examined the claimant; and (3)  
8 sources who have neither examined nor treated the claimant, but  
9 express their opinion based upon a review of the claimant's medical  
10 records. 20 C.F.R. § 416.927. A treating physician's opinion  
11 carries more weight than an examining physician's, and an examining  
12 physician's opinion carries more weight than a non-examining  
13 reviewing or consulting physician's opinion. *Benecke v. Barnhart*,  
14 379 F.3d 587, 592 (9<sup>th</sup> Cir. 2004); *Lester v. Chater*, 81 F.3d 821,  
15 830 (9<sup>th</sup> Cir. 1995), "As is the case with the opinion of a treating  
16 physician, the Commissioner must provide 'clear and convincing'  
17 reasons for rejecting the uncontradicted opinion of an examining  
18 physician." *Lester*, 81 F.3d at 830 (citation omitted). If the  
19 opinion is contradicted, it can only be rejected for "specific" and  
20 "legitimate" reasons that are supported by substantial evidence in  
21 the record. *Andrews*, 53 F.3d at 1043.

22 Historically, the courts have recognized conflicting medical  
23 evidence, the absence of regular medical treatment during the  
24 alleged period of disability, and the lack of medical support for  
25 doctors' reports based substantially on a claimant's subjective  
26 complaints of pain as specific, legitimate reasons for disregarding  
27 a treating or examining physician's opinion. *Flaten v. Secretary of*  
28 *Health and Human Servs.*, 44 F.3d 1453, 1463-64 (9<sup>th</sup> Cir. 1995); *Fair*,

1 885 F.2d at 604.

2 1. Cervical Spine DDD

3 At step two, the ALJ found the medical evidence did not support  
4 a finding that Plaintiff's cervical spine condition caused  
5 significant work-related functional limitations. (Tr. 15.)  
6 Plaintiff argues this was error because the ALJ cited only to  
7 medical evidence showing a mild impairment and did not give adequate  
8 reasons for rejecting examining medical doctor Joseph Diehl's  
9 opinion that Plaintiff would have "difficulty with work activities  
10 that required repetitive motion at the cervical spine." (Ct. Rec.  
11 24 at 14; Tr. 165.)

12 The record shows that Dr. Diehl stated he based this opinion on  
13 Plaintiff's subjective complaints, as well as objective findings of  
14 tenderness in the cervical area. (*Id.*) Further, he stated, "the  
15 permanent nature of any disability in this case is seriously in  
16 question." (Tr. 167.) He observed Plaintiff was receiving no  
17 medical care at the time of the exam. He concluded the use of anti-  
18 inflammatory medication "would improve her condition considerably."  
19 (*Id.*)

20 In his step two findings, the ALJ referenced objective imaging  
21 that showed only mild degeneration of the cervical spine and no  
22 evidence of "significant work-related functional limitations." (Tr.  
23 15.) In his summary of the evidence, the ALJ specifically  
24 referenced Dr. Diehl's opinion that Plaintiff would have difficulty  
25 with activities involving repetitive motions of the cervical spine.  
26 (Tr. 18.) The ALJ rejected this particular limitation as  
27 unsupported by (1) the objective imaging reports showing only mild  
28 changes, and (2) opinions of other examining medical doctors. He

1 also found there was no other supporting evidence in the record that  
2 Plaintiff's ability to do work-related activities was significantly  
3 limited by cervical spine problems. (Tr. 18.) These are specific,  
4 legitimate reasons for rejecting a contradicted medical opinion.  
5 *Thomas*, 278 F.3d at 957; see also *Fair*, 885 F.2d at 605. Further,  
6 the record in its entirety supports the ALJ's rejection of this  
7 distinct limitation. For example, in later discussion of the  
8 medical evidence, the ALJ noted Dr. Diehl's opinion that Plaintiff's  
9 limitations would improve with medication. (*Id.*) He also  
10 referenced Dr. Jamie King's evaluation in which the examining  
11 physician opined Plaintiff could stand and walk for four hours, and  
12 sit for six hours in an eight-hour day with breaks. (Tr. 18, 201-  
13 03.) Dr. King specifically stated that other than postural  
14 limitations on bending, stooping and crouching, there were no other  
15 relevant limitations. (Tr. 203.)

16 Even if there were evidence of more than a minimal effect on  
17 Plaintiff's ability to do work activities, the ALJ considered the  
18 effects of Plaintiff's spinal disorders (severe and non-severe)  
19 throughout the five-step sequential evaluation. The final RFC  
20 determination specifically incorporated an at-will sit/stand option  
21 to relieve discomfort from exertion or postures that would be  
22 limited by her cervical spine condition. At step five, the four-  
23 hour limit on standing and walking and the stand/sit at will  
24 requirements were propounded to the VE, who then opined the  
25 hypothetical individual could perform several other jobs in the  
26 national economy. (Tr. 317-18.) Because the ALJ continued the  
27 sequential evaluation considering severe and non-severe impairments,  
28 Plaintiff was not prejudiced and the alleged error at step two would

1 be deemed harmless. *Lewis v. Astrue*, 498 F.3d 909, 910 (9<sup>th</sup> Cir.  
2 2007); *Stout v. Commissioner, Social Sec. Admin.*, 454 F.3d 1050,  
3 1056 (9<sup>th</sup> Cir. 2006).

4 2. Anxiety Disorder versus PTSD

5 Citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9<sup>th</sup> Cir. 1988) and  
6 SSR 96-2, Plaintiff appears to argue the ALJ did not properly reject  
7 the marked mental limitations assessed by Deana Dahl, Plaintiff's  
8 treating nurse practitioner. (Ct. Rec. 24 at 16.) However,  
9 Plaintiff argues standards that apply to an "acceptable medical  
10 source." (*Id.* at 17.) The *Embrey* court, as cited by Plaintiff,  
11 found uncontradicted conclusions of treating physicians cannot be  
12 disregarded unless "clear and convincing" reasons are set forth in  
13 detail. *Embrey*, 849 F.2d at 421-22. Here, Ms. Dahl is not a  
14 treating physician or an "acceptable medical source" for purposes of  
15 these proceedings. Under the Regulations, a nurse practitioner is  
16 considered an "other source." 20 C.F.R. § 416.913(d). "Other  
17 source" opinions can never establish a diagnosis or disability  
18 absent corroborating competent medical evidence. *Nguyen v. Chater*,  
19 100 F.3d 1462, 1467 (9<sup>th</sup> Cir. 1996). The opinion of an acceptable  
20 medical source is given more weight than that of an "other source."  
21 20 C.F.R. §§ 404.1527, 416.927; *Gomez v. Chater*, 74 F.3d 967, 970-  
22 71. (9<sup>th</sup> Cir. 1996). However, the ALJ is required to "consider  
23 observations by non-medical sources as to how an impairment affects  
24 a claimant's ability to work." *Sprague*, 812 F.2d at 1232. As ruled  
25 in *Dodrill v. Shalala*, 12 F.3d 915, 919 (9<sup>th</sup> Cir. 1993), an ALJ is  
26 obligated to give reasons "germane" to "other source" testimony  
27 before discounting it.

28 Here, the ALJ gave Ms. Dahl's August 20, 2007, medical report

1 and mental RFC assessment little weight. (Tr. 19, 282-91.)  
2 Although Plaintiff asserts the ALJ's reasoning was vague, the ALJ  
3 articulated specific reasons for discounting the severe limitations  
4 assessed by Ms. Dahl: (1) her findings were inconsistent with her  
5 treatment record; (2) she did not prescribe pain medication; (3) she  
6 did not require treatment for pain complaints or mental health  
7 issues; and (4) there was no evidence of objective intellectual  
8 functioning testing. (Tr. 19.) The ALJ's reasoning is supported by  
9 the record, including notes in April 2004, by Ms. Dahl that  
10 Plaintiff reported her anxiety was "not severe," and she no longer  
11 needed prescribed anxiety medication. (Tr. 192.) Other treatment  
12 notes from Ms. Dahl's clinic do not reflect complaints or  
13 recommended treatment for anxiety or PTSD. (Tr. 193, 248-63.)

14 For example, in clinic notes dated August 10, 2007, (ten days  
15 before Ms. Dahl completed her medical report and RFC), a physician  
16 at Ms. Dahl's clinic indicated "no unusual anxiety or evidence of  
17 depression." (Tr. 263.) The ALJ did not err in his rejection of  
18 Ms. Dahl's opinion evidence.

19 Citing *Regennitter v. Commissioner of Social Sec. Admin.*, 166  
20 F.3d. 1294 (9<sup>th</sup> Cir. 1999), Plaintiff also argues the ALJ erred when  
21 he "rejected [her] mental health impairments because of a lack of  
22 treatment." (Ct. Rec. 24 at 16, 18.) Plaintiff's reliance on this  
23 case is misplaced. First, the ALJ did not reject Plaintiff's mental  
24 impairments; he found her diagnosed "anxiety disorder versus  
25 posttraumatic stress disorder" was not a severe impairment at step  
26 two, but he clearly stated that this non-severe impairment "will be  
27 considered in assessing the claimant's residual functional  
28 capacity." (Tr. 15.) Second, in *Regennitter*, the ALJ cited lack of



1 treatment as a reason to reject the claimant's credibility, not a  
2 medical opinion. *Regennitter*, 166 F.3d at 1296. Indeed, the  
3 reviewing court in *Regennitter* held the rejection of a claimant's  
4 complaints for lack of treatment due to his inability to pay is not  
5 a "clear and convincing" reason to support a credibility finding.  
6 *Id.* at 1297. Further, the Ninth Circuit has held that the  
7 credibility of a claimant with mental impairments cannot be impugned  
8 because he or she fails to seek treatment. *Nguyen v. Chater*, 100  
9 F.3d 1462, 1465 (9<sup>th</sup> Cir. 1996). Here, the ALJ neither rejected  
10 Plaintiff's claim of mental health impairment nor chastised her for  
11 lack of mental health treatment. He reasoned Nurse Dahl's failure  
12 to recommend mental health treatment or prescribed medication was  
13 inconsistent with her findings that Plaintiff was markedly limited  
14 by psychological impairments. This reasoning is not legal error and  
15 is sufficient to reject an other source opinion.

16 In his evaluation of mental impairments, the ALJ gave weight to  
17 opinions from examining psychologist Jamie Carter, Ph.D., and agency  
18 reviewing psychologist Janis Lewis, Ph.D., both of whom are accepted  
19 medical sources. (Tr. 19, 206-09, 218-33.) Dr. Carter diagnosed  
20 anxiety disorder and borderline intellectual function based on  
21 results of objective testing. (Tr. 209.) The ALJ summarized Dr.  
22 Carter's report, noting the reported deficits would slow Plaintiff's  
23 pace, her ability to follow directions, and her ability to learn new  
24 complex tasks. He then pointed out that Plaintiff had worked in the  
25 past with the identified mental impairments, and that there was no  
26 evidence in the record that she was incapable performing the level  
27 of work described in the final RFC, *i.e.*, simple repetitive tasks  
28 with no public contract. (Tr. 18, 19.) The state agency

1 psychologist, Dr. Lewis, reviewed Dr. Carter's evaluation and  
2 assessed Plaintiff's functional capacity in a narrative summary, as  
3 well as a check box form. (Tr. 218-34.) Dr. Lewis found Plaintiff  
4 was "capable of simple repetitive tasks and would work best with  
5 only minimal contact." (Tr. 220.)

6 Plaintiff argues the ALJ failed to explain the weight given Dr.  
7 Carter's opinions and ignored Dr. Lewis' numerous moderate  
8 limitations marked on the check box form. (Ct. Rec. 24 at 19.)  
9 However, Plaintiff does not identify what portions of Dr. Carter's  
10 report were erroneously rejected, or what limitations caused by  
11 anxiety vs. PTSD are supported by the record and should have been  
12 included. A review of the record in its entirety indicates the ALJ  
13 did not err in his evaluation of the psychologists' evidence or his  
14 step two finding that Plaintiff's anxiety vs. PTSD was not severe.

15 A mental impairment generally is considered not severe if the  
16 degree of limitation in the three functional areas of activities of  
17 daily living, social functioning, and concentration, persistence or  
18 pace is rated as "none" or "mild" and there have been no episodes of  
19 decompensation. 20 C.F.R. § 416.920a(d)(1). Plaintiff appears to  
20 argue that her anxiety symptoms caused more than minimal limitations  
21 in her ability to work. However, she does not identify specific  
22 symptoms or how they would limit her. For example, Dr. Carter noted  
23 anxiety disturbed sleep "might affect her ability to maintain a work  
24 schedule." (Tr. 209.) This speculative opinion alone does not  
25 establish severity.

26 Dr. Carter also noted Plaintiff could perform her activities of  
27 daily living: she did most of her household chores; was able to read  
28 and follow recipes; did grocery shopping and laundry. She needed

1 reminders regarding personal hygiene, but remembered to take her  
2 medicine. (Tr. 207-208.) It appears these limitations are related  
3 to her borderline intellectual functioning impairment, which the ALJ  
4 found severe. In the area of social functioning, Dr. Carter noted  
5 Plaintiff interacted primarily with her family and husband, going  
6 out to eat and attend church. Regarding her concentration,  
7 persistence and pace, Plaintiff was able to do computer work, arts  
8 and crafts for about an hour at a time, and read for a couple of  
9 hours at a time. She had some problems getting words mixed up, and  
10 finishing her daily activities in a timely manner. Dr. Carter  
11 suggested Plaintiff's deficits in personal hygiene could affect  
12 employability. (Tr. 208-09.) Plaintiff does not argue these  
13 deficits are caused by anxiety or PTSD.

14 The ALJ rationally interpreted Dr. Carter's report as  
15 substantial evidence that the diagnosed anxiety disorder vs. PTSD  
16 did not cause "more than minimal limitation" in Plaintiff's ability  
17 to work. 20 C.F.R. §§ 416.920; 416.920a, 416.920a(d)(1).

18 Reviewing psychologist Dr. Lewis based her mental RFC  
19 assessment on Dr. Carter's evaluation. (Tr. 220.) The check box  
20 form indicates several moderate limitations; however Dr. Lewis'  
21 narrative interpretation summarizes assessed functional limitations  
22 in detail and concludes that Plaintiff was capable of simple  
23 repetitive tasks and would work best with limited public contact.  
24 (Tr. 220.) Because the ALJ did not disagree with Dr. Lewis's  
25 narrative description of Plaintiff's mental RFC (which is supported  
26 by the examining psychologist's evidence), he was not required to  
27 reject those opinions. Further, he is not required to accept the  
28 conclusory findings in the check box form. *Crane v. Shalala*, 76

1 F.3d 251, 254 (9<sup>th</sup> Cir. 1996); see also SSR 96-8p and SSR 96-5p. See  
2 also *Lester*, 81 F.3d at 831 (citing *Pitzer v. Sullivan*, 908 F.2d  
3 502, 506 n.4 (9<sup>th</sup> Cir. 1990)(non-examining physician opinion, without  
4 more, is not substantial evidence).

5 Because neither acceptable medical source identified more  
6 symptoms caused by anxiety or PTSD, the ALJ did not err at step two.  
7 Further, assuming this impairment were severe, Plaintiff was not  
8 prejudiced by this omission because the identified limitation caused  
9 by anxiety was considered throughout the sequential evaluation and  
10 included in the hypothetical at step five. Therefore, the claimed  
11 error would be harmless. *Lewis*, 498 F.3d at 910; *Stout*, 454 F.3d at  
12 1056.

### 13 **C. Step Five**

14 Plaintiff argues the ALJ erroneously relied on vocational  
15 expert testimony based on a deficient hypothetical question. (Ct.  
16 Rec. 24 at 20.) The ALJ may rely on vocational expert testimony if  
17 the hypothetical presented to the expert includes all functional  
18 limitations supported by the record and found credible by the ALJ.  
19 *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9<sup>th</sup> Cir. 2005). In his  
20 first hypothetical, the ALJ included all exertional limitations  
21 supported by the medical record and Plaintiff's credible testimony.  
22 Plaintiff argues the ALJ should have included limitations assessed  
23 by Nurse Dahl, which the VE opined would preclude sustained  
24 employment. (Ct Rec. 24 at 20.) She also contends the ALJ failed  
25 to include unrejected limitations assessed by agency psychologists.  
26 However, as discussed above, the ALJ specifically rejected Nurse  
27 Dahl's opinions with germane and specific reasons, and properly  
28 evaluated the opinions from acceptable medical sources.

1 Because the ALJ was not required to include properly rejected  
2 limitations, the hypothetical relied upon by the VE reflects  
3 limitations supported by the record and credible testimony. In  
4 addition, limitations due to obesity were incorporated into the  
5 hypothetical which described an individual limited to lifting or  
6 carrying 10 pounds frequently, 25 pounds occasionally, and who could  
7 walk and stand only four hours in an eight-hour day and needed a  
8 sit/stand-at-will option. (Tr. 317.)

9 Obesity must be considered in a claimant's RFC because it can  
10 cause postural limitations of function. SSR 02-01p. An assessment  
11 should be made of the effect obesity has upon the individual's  
12 ability to perform routine movement and necessary physical activity  
13 within the work environment. Here, the medical evidence upon which  
14 the ALJ based his hypothetical and RFC determination identified  
15 Plaintiff's morbid obesity, which the evaluators incorporated into  
16 in their functional assessments. For example, Dr. Diehl  
17 specifically stated that in addition to degenerative joint disease,  
18 Plaintiff's obesity "complicates her orthopedic status  
19 considerably." He also stated his final functional capacity  
20 assessment was based in part on the "objective findings of obvious  
21 morbid obesity." (Tr. 166.) Nonetheless, he concluded Plaintiff  
22 could do work activities requiring standing or walking for five to  
23 six hours of an eight-hour day with breaks every half hour to hour.  
24 (*Id.*)

25 Likewise, Dr. King noted Plaintiff's ability to climb on the  
26 examining table was difficult "due to her obese body habitus." (Tr.

1 201.) She also noted Plaintiff did not require an assistive device.<sup>2</sup>  
2 (*Id.*) The record shows that on exam, Plaintiff exhibited normal  
3 muscle bulk, tone and 5/5 strength in grip and upper extremities.  
4 (*Id.*) Pain in lower extremities was relieved by shifting position.  
5 (Tr. 203.) Dr. King concluded Plaintiff could do work activities as  
6 long as she had breaks and could shift her weight. (Tr. 203.) As  
7 discussed above, the ALJ incorporated these requirements in his RFC  
8 and hypothetical to address the impact of Plaintiff's obesity on  
9 otherwise mild to moderate joint disease.

10 The final determination regarding Plaintiff's ability to  
11 perform basic work is the sole responsibility of the Commissioner,  
12 and no special significance is given to a medical source, or other  
13 source, opinion on issues reserved to the Commissioner. 20 C.F.R.  
14 § 416.927(e), .946; SSR 96-5p. The ALJ's hypothetical was not  
15 deficient; therefore, the VE testimony is substantial evidence that  
16 supports the ALJ's step five findings. Where, as here, the ALJ's  
17 findings are based on a rational interpretation of substantial  
18 evidence, the Commissioner's determination can not be disturbed.  
19 Accordingly,

20 **IT IS ORDERED:**

21 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 23**) is  
22 **DENIED;**

23 \_\_\_\_\_  
24 <sup>2</sup> There is no medical evidence Plaintiff has difficulty  
25 ambulating and must depend on a walker, canes, or crutches, which is  
26 a requirement to meet or equal the Listing for musculoskeletal  
27 impairment. See 20 C.F.R. § 404, Subp. P, App. 1, at 1.00(B)(1),  
28 (2)(b)(2).

1           2. Defendant's Motion for Summary Judgment (**Ct. Rec. 28**) is  
2 **GRANTED;**

3           The District Court Executive is directed to file this Order and  
4 provide a copy to counsel for Plaintiff and Defendant. The file  
5 shall be closed and judgment entered for Defendant.

6           DATED July 27, 2009.

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8                               S/ CYNTHIA IMBROGNO  
9                               UNITED STATES MAGISTRATE JUDGE  
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